

The Indiana Prosecutor

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BLAKELY LEGISLATION AMENDED TO REMOVE “PRESUMPTIVE SENTENCE”

At its regularly scheduled meeting on March 18, The Indiana Association of Prosecuting Attorneys, Inc. Board of Directors instructed IPAC Executive Director Stephen Johnson to oppose S.B. 96 as originally drafted. S.B. 96, “the *Blakely* Bill,” would have mandated a bifurcated trial in any case in which the State sought to have a defendant sentenced to greater than the presumptive sentence for the crime with which he was charged. During the second part of that trial (the sentencing phase) a jury would have been required to determine the existence of aggravating factors upon which a court could rely in enhancing a defendant’s sentence under the original Bill

Johnson called the Bill’s sponsor, Senator David Long, (R) - Fort Wayne, immediately following the Board meeting. Senator Long was amenable to amendment of the Bill and in fact an amendment was offered on Wednesday, March 23. The new language makes what has traditionally been the presumptive sentence “a voluntary guidepost.” On Wednesday, the Bill, as amended, passed out of the House Committee on Courts and Criminal Codes by a vote of 10-0.

RECENT DECISION TOPICS

- *Smylie v. State* — Blakely Applies in Indiana
- *Guy v. State* — “Put Means Put”
- *Carroll v. State* — Can Person Be Detained & Searched While Search Warrant Executed?
- *State v. Felker* — Indiana Supreme Court Denies Transfer in Felker
- *Roper v. Simmons* — No Death Penalty for Juveniles

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Indiana

• ***Blakely* Applies in Indiana**

Smylie v. State, ___ N.E.2d ___ (Ind. Sup. Ct. 3/9/05).

For months prosecutors waited for the Indiana Supreme Court to decide the applicability of *Blakely v. Washington*, to Indiana's sentencing scheme. On March 9, the Indiana Supreme Court, in *Smylie v. State*, held that Indiana's sentencing scheme is unconstitutional because it allows aggravating factors to be determined by a judge, not a jury, and it allows such factors to be used to enhance a sentence beyond the statutory maximum.

Adolphe Smylie pled guilty to two counts of child solicitation in Johnson Superior Court. The trial court increased Smylie's sentence upon his two Class D Felony convictions after it found four aggravating circumstances and two mitigating factors. The court sentenced Smylie to consecutive two-year terms on each count, with six months suspended, for a total of three and one-half years.

The Supreme Court concluded that Indiana's "fixed term" (1 ½ years for a Class D Felony) is the functional equivalent of Washington's "standard sentencing range" for *Blakely* purposes. An Indiana "trial judge must engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed," the Court said. It was the Indiana Supreme Court's conclusion that it was just this type of judicial fact-finding that the U.S. Supreme Court found unconstitutional in *Blakely*.

The Court suggested that there were two ways by which the constitutional infirmity of Indiana's sentencing scheme could be rectified. First, the Court said, an acceptable alternative would be to modify the present arrangement of fixed presumptive terms, "to require jury findings on facts in aggravation" (a bifurcated trial). In the alternative, the Court recognized that another way to solve the problem would be "a system in which there is no stated 'fixed term' (or at least none that has legally binding effect) in which judges would impose sentences without a jury." The Court went on to say that the first of these alternatives was, in its opinion, probably more faithful to the objectives of the General Assembly's purpose. The Court held that the "sorts of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's sentencing laws."

Smylie also challenged the constitutionality of the trial court's imposition of consecutive sentences. The Supreme Court held that "there is no constitutional problem with consecutive sentencing so long as the trial court does not, in imposing those sentences, exceed the combined statutory maximums of the sentences. Smylie's case was remanded to the trial court "for a new sentencing hearing should the State elect, with the intervention of a jury." The trial court's order of consecutive sentences was affirmed.

Finally, the Court held that "because *Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, it represents a new

rule of criminal procedure." Thus, a *Blakely* challenge was held to be available, if preserved, in cases on direct appeal.

• **"Put" Means "Put"**

Guy v. State, ___ N.E.2d ___ (Ind. Ct. App. 3/2/05).

Brenna Guy was observed driving the wrong way on a street in downtown Indianapolis in the early morning hours of August 24, 2001. The Indianapolis Police Department officer who made that observation, pulled Guy over and conducted three field sobriety tests, all of which Guy failed. Once the officer had determined that a breath test was appropriate in the situation, he watched Guy for 20 minutes to be sure that she had nothing to eat or drink and that she did not smoke prior to the test. The officer even looked into Guy's mouth before starting the 20 minute waiting period. The officer observed a tongue stud in Guy's mouth but did not order her to remove it. The breath test showed that Guy had a BAC of .11 grams of alcohol per 210 liters of breath at the time the test was given. Guy was charged with OWVI and OWVI With a BAC Between .08 and .15. Guy moved to suppress the results of the breath test. The trial court denied that motion. The Court of Appeals reversed the trial court. The Indiana Supreme Court took the case on transfer.

For an answer to the question presented in this appeal, the Supreme Court looked to the breath test regulations found in the Indiana Administrative Code. Those regulations specify that "the person to be tested must have had nothing to eat or drink, must not have put any foreign substance in his or her mouth or respiratory tract, and must not smoke within 20 minutes prior to the time the breath sample is taken." Guy acknowledged that her tongue stud was not put in her mouth during the 20 minute waiting period, but argued that a correct interpretation of the regulation is that prior to breath testing a person must not have had any foreign substance in her mouth during the required twenty minute waiting period.

The logical conclusion to be drawn from the Department of Toxicology's use of the word "put", the Court said, is that any foreign substance placed in a person's mouth more than twenty minutes prior to a breath test poses no problem and does not affect the reliability of the breath test results. The defense argued that this conclusion would lead to an absurd result that would allow the admission of breath test results despite a person putting "anything" in her mouth more than 20 minutes prior to the test.

The Supreme Court took note that a number of studies have shown that a 15-20 minutes waiting period during which nothing is placed in a person's mouth allows sufficient time for any mouth alcohol to dissipate. The Court found that these studies supported the Department of Toxicology's decision to require that nothing be "put" in a person's mouth within 20 minutes of a breath test.

The Supreme Court did acknowledge that the State could be obliged to defend the validity of the regulations should a defendant submit admissible scientific studies or expert testimony to a trial court in support of a motion to suppress. In that this did not occur here, the trial court's denial of the defendant's motion to suppress was affirmed.

Recent Decisions Update (continued)

Indiana

- **Can Person Be Detained and Searched While Search Warrant Executed?**

Carroll v. State, 822 N.E.2d 1083 (Ind. Ct. App. 2/28/05). Travis Carroll had shared an apartment with Jody Miller since April, 2004. After police officers in Gibson County learned that Carroll had supplied methamphetamine to another person, they obtained a warrant in June, 2004, to search the apartment in which Miller and Carroll lived. When the officers arrived to serve the search warrant, Carroll's car was not present, so the officers waited nearby for him to return. Subsequently, Carroll returned to the apartment accompanied by two male companions. Officers confronted Carroll in the parking lot and advised him of the search warrant. The defendant, who was described by police as "a pretty big guy," became "very belligerent, argumentative, very jerky in his motions." The police officers observed that Carroll was sweating; that he kept licking his lips; and that his eyes were dilated. The officers suspected that Carroll was under the influence of methamphetamine. Fearing for his safety, one of the officers put Carroll in handcuffs and patted him down for weapons. The officers then moved Carroll and his companions inside the apartment and commenced the search of the residence.

One of Carroll's companions told the police that there was marijuana under one of the arm rests on a couch in the living room. After marijuana was found there, one of the officers present looked at Carroll and said, "I know that you - you've got the dope and you probably have it down your pants." One of the other officers who witnessed this exchange said that Carroll then lowered his head. Carroll was asked to stand up. At that point Carroll said, "I'll get it" after which he walked over by the bathroom, raised his shirt and removed a plastic bag from his belt line. The plastic bag retrieved was found to contain methamphetamine.

Carroll challenged the legality of the search of his person in the circumstance just described. The Court of Appeals said that the legality of the search hinged on the legality of Carroll's detention. The specific question the Court had to answer was "whether officers executing a search warrant have the authority to require a person to re-enter the residence and to remain there while a search is conducted."

The Court of Appeals concluded that the detention and search of Carroll's person was consistent with Fourth Amendment principles. This case sets forth an excellent review of the case law supporting the Court in its conclusion.

- **Indiana Supreme Court Denies Transfer in Felker**

State v. Felker, 819 N.E.2d 870 (Ind. Ct. App. 12/29/04). *trans.denied* 3/21/05

Officers investigating marijuana found in a field across the

road from Jason Felker's residence approached Felker near his home. The investigating trooper identified himself and explained his purpose in being there. The trooper asked Felker if he had ever been in trouble with the law. Felker advised that he was currently on probation for operating a vehicle while intoxicated. Felker was then advised of his constitutional rights and asked for consent to search his residence. Felker told the trooper that he would prefer that the trooper get a search warrant. The trooper asked Felker to sit on a swing nearby. When Felker became nervous and began putting his hands in his pocket, the trooper asked him if he would be willing to place the contents of his pockets on the hood of a nearby vehicle. Felker removed a "one-hitter" from his pocket. The trooper noted that the "one-hitter" smelled of burnt marijuana. As the trooper called the probation department to confirm the defendant's probationary status, Felker grabbed the "one-hitter" and threw it into a nearby woods. Felker was arrested and the "one-hitter" was retrieved from the woods. Once in the police car, Felker admitted that there was additional paraphernalia inside his residence. Felker's wife confirmed the presence of a "bong" inside the house. The trooper declined the wife's consent to retrieve the item in that he had already begun the process of obtaining a search warrant.

Felker filed a motion to suppress the evidence seized. The trial court granted the defendant's motion. The Court of Appeals affirmed the trial court. On appeal, the Court concluded that the circumstances of Felker's encounter with the trooper would have communicated to a reasonable person "that the person was not free to decline the officer's requests or otherwise terminate the encounter." What may have begun as a consensual encounter had become an investigative detention in the opinion of the Court of Appeals.

The State petitioned for transfer. In its transfer petition, the state argued that nothing in the encounter between the trooper and Felker showed that the defendant had been "seized" by the officer. The State argued that "no reasonable inference exists to believe that the trooper's conduct with Defendant was in any way violative of Defendant's Fourth Amendment rights." The State's position was that the encounter between Felker and the trooper remained consensual and was subject to Felker's own decision to terminate the encounter or allow it to continue. "All reasonable inferences," the State argued, "reveal that Defendant was not seized until he was placed under formal arrest" and the evidence seized should have been admitted into evidence.

The Supreme Court did not agree with the State's position. Transfer was denied. The Court of Appeals decision stands.